Supreme Court, U. S.
FILED
MAR 28 1979
MICHAEL RODAK, JR., CLERK

No. 78-1451

In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES J. MCCOY AND EILEEN R. RASULIS, APPELLANTS

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION AND WELFARE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF THE FEDERAL APPELLEE TO DISMISS

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1451

JAMES J. McCOY AND EILEEN R. RASULIS, APPELLANTS

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION AND WELFARE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF THE FEDERAL APPELLEE TO DISMISS

Appellants seek review of a judgment that their complaint did not state a claim on which relief could be granted (J.S. App. A1-A3). No statute provides jurisdiction for an appeal to this Court from such a judgment. 28 U.S.C. 1252 does not apply because neither the district court nor the court of appeals declared an Act of Congress to be unconstitutional. 28 U.S.C. 1253 does not apply because the case was not required to be heard by a three-judge district court. The other statutes on which appellants rely (J.S. 7) do not pertain to the jurisdiction of this Court.* The appeal accordingly should be dismissed for want of jurisdiction, and the papers

---

*Some of the statutes do not pertain to the jurisdiction of any court. 28 U.S.C. 1391(e) concerns venue rather than jurisdiction, and the Administrative Procedure Act, 5 U.S.C. 702-706, does not grant jurisdiction. *Califano* v. *Sanders*, 430 U.S. 99 (1977).

whereon the appeal is taken should be treated as a petition for a writ of certiorari. 28 U.S.C. 2103.

The Court should deny the petition because it is jurisdictionally out of time. The judgment of the court of appeals was entered on September 19, 1978, and a petition for rehearing was denied on October 12, 1978 (J.S. App. B1). The 90 days provided by 28 U.S.C. 2101(c) within which to file a petition for a writ of certiorari expired on January 10, 1979. The petition was not filed until January 17, 1979, and is thus out of time.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1979

DOJ-1979-03